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THE CIVIL SERVICE CLAUSE IN THE CONSTITUTION

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THE civil service reform movement in New York state may be said to have had its beginning on May 11, 1877, when a call was issued for the organization of an "Association for the promotion of Civil Service Reform." This association devoted its efforts to the federal as well as to the state service, and helped to secure the passage of the Pendleton civil service bill on January 16, 1883. Four months later a state civil service bill prepared by this association received the approval of Governor Cleveland, who designated as commissioners President Andrew D. White of Cornell University, Attorney General Augustus Schoonmaker of Ulster County, and Henry A. Richmond of Buffalo. Mr. White finding it impossible to serve, Hon. John Jay was appointed in his stead. The eighth section of the state law authorized the mayor of each city in the state having a population of 50,000 or upwards to establish a merit system of municipal appointments. Mayors Low of Brooklyn, Scoville of Buffalo and Edson of New York subsequently issued rules in accordance with the civil service act.

For the first two years the system was sympathetically and effectively administered as an aid to good administration. This record did not continue, however, and during Governor Flower's administration the situation required a thorough investigation by a committee of the legislature. This legislative inquiry showed that in New York state the operation of the civil service law had been almost nullified by bad administration, while it was demonstrated beyond all question by the testimony of executive officers of the United States and Massa-

chusetts civil service commissions that elsewhere the success of the merit system had been unqualified.

Closely following the senate investigation came the adoption by the constitutional convention of 1894 of the following civil service amendment :

Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section.

The Civil Service Reform Association had been engaged for several months before the convention met in promoting a movement to bring to the attention of the delegates the importance of this recognition of the principle of civil service reform. In recognition of the general demand for careful consideration of the subject, President Joseph H. Choate appointed a committee on the civil service, and a series of hearings was accorded to the organized advocates of civil service reform. The section was reported and came up for consideration in the closing days of the convention. There was a spirited fight over the adoption of the amendment. Some of the delegates were opposed to the merit system in every way; others objected to putting such matters into the constitution, claiming that they fell only within the province of ordinary legislation. The amendment was finally carried by a vote of 97 to 54. Of the Republican delegates, 58 voted in its favor and 41 against it; of the Democrats, 39 voted for and 13 against it. A strong speech by Elihu Root of New York is credited with holding a majority of the Republican vote to the affirmative side, as a good many delegates of that party manifested a disposition to break away.

Two features of the amendment as finally framed were added to it after the form agreed on by the Civil Service Reform Association and the civil service committee of the convention had been reported,—the application of the section to counties, towns and villages, and the veteran preference clause. The former cost the amendment 40 Republican votes, and it is believed that had the amendment been put on its passage without that feature the vote would have been very nearly unanimous. The ratification of the constitution followed in November of 1894, and New York became the first state of the union to embody the principle of civil service reform in its organic law. In 1912 Ohio followed New York's example by putting a similar civil service clause (except that the preference of veterans of the Civil War was omitted) into its constitution by a popular majority of more than 100,000.

One of the practical results of the adoption of the constitutional provision was the extension of the civil service rules to cover the 1200 employes of the public works and prisons departments who had been exempted since 1887 under a decision of the court of appeals holding it unconstitutional to vest the power of appointment elsewhere than in the official heads of the departments in question. These employes formed at that time one-fourth of the state civil service. During the administration of Governor Morton a thorough revision of the rules and classification was made, which greatly reduced the number of exempt and non-competitive places.

Governor Black, who succeeded Governor Morton, declared that in his judgment "civil service would work better with less starch." Late in the session of 1897 the "Black civil service bill" appeared, which provided as radical a piece of reactionary legislation as could have been devised. The bill required that in all examinations for the state, county and municipal services not more than fifty per cent might be given for "merit" and the rest of the rating, representing "fitness," was to be designated by the appointing officer. While it was clearly shown that the passage of the bill would wreck the merit system, yet, as a party measure, it was placed on the statute books. The results of the operation of the Black civil

service act showed that in the larger cities department officers, with few exceptions, continued the old system of designating the civil service commissions to act as their examiners for "fitness" as well as for "merit." Wherever the act had been permitted to go into full operation in accordance with its spirit it was shown that the competitive scheme as understood by the framers of the constitution in 1894 had been destroyed, while a cumbrous and unsatisfactory system had been set up in its stead.

In 1899 all this was changed. The "Black act" was repealed and its operation in the state departments discontinued. A new law, general in its application and superior to any civil service statute theretofore secured in America, was enacted. The passage of this bill relieved an anomalous and confusing situation. As a result of the vicious legislation under Governor Black four systems of widely differing character had come into existence by January 1899. New York city had its charter rules, the state departments were conducted under two adaptations of the Black law, and in the smaller cities the plan of the original law of 1883 was followed. Owing to the firm attitude of Governor Roosevelt, a complete revision of the law was accomplished. Seventeen previous statutes enacted within the period from 1883 to 1898, including the Black law, were repealed and superseded. The state commission, after recasting its own system, was authorized to prescribe rules for the larger counties as rapidly as proved practicable. It was also given greatly increased supervisory powers over municipal commissions. For the purposes of investigation of the administration of the law and rules it was given all the power of a legislative committee. The law provided no substantial safeguard against the unwarranted removal of competent employes, but it was far superior to the statutes it repealed, and its passage was one of the valuable achievements of Governor Roosevelt.

Since 1899 the classification has been extended to the larger counties and villages, resulting in increased efficiency in those services.

The law in the hands of effective and sympathetic administrators has worked in the interest of good administration. In

the hands of its enemies the constitutional provision has been the bar which has prevented the complete debauchery of the service. The clause is sufficient to protect the essential elements of the merit system.

So much for the history of the provision. What are its essentials, and the principal suggestions which will probably be made for amendments? The provision reads as follows:

Appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive.

This provision starts out with a general statement of principle applying to all appointments and promotions, *i. e.*, they shall be made for merit and fitness. It then proceeds to provide that merit and fitness shall be ascertained by examination, if practicable, and by the competitive method, if this is further practicable. In other words, it recognizes that examinations for appointment and promotion are not necessarily applicable to all positions by inserting the words "so far as practicable."

The provision is properly elastic. It provides for improved methods of examination for testing competency by which appointments under the competitive system formerly not practicable may, through the use of these methods, become practicable. It is brief in its statement, in accordance with recognized principles in drafting a constitution, and yet is comprehensive in applying to the state and all civil divisions thereof and to all appointments and promotions.

The principal suggestions which may be made for amendments to this provision are four in number:

1. An extension of the competitive principle to cover all appointive offices and employments. This means that all public officers and employes other than those elected by the people, including on the one hand heads of departments, election officers, appointive judicial officers, private secretaries, *etc.*,

and on the other mere laborers, shall be appointed as the result of some form of competitive examination. No half-way step between this broad proposition and the present constitutional provision for competition so far as practicable seems possible, for it is impracticable satisfactorily to name or specifically describe in the constitution the positions which shall be exempt. Moreover, there is at present no general agreement as to how far competition should be extended. Some civil service reformers believe, as suggested, that all positions should be filled as the result of competitive examination. Others just as sincerely believe that the higher and more responsible offices cannot be successfully filled by any form of competitive examinations yet devised. All the friends of the merit system desire to see the scope of competition extended as far and as fast as is practicable, and most of us hope that in time all public officers and employes who are not engaged in determining, as distinguished from executing, the policy of an administration, may be brought within the competitive principle. Great progress is being made in devising and conducting competitive examinations for very important and responsible positions, and the success achieved in that direction assures us that it will be found practicable in the future to extend the scope of competition far beyond the line now reached. For the present, however, the writer believes that it will be wiser to leave the constitutional provision as it is, especially as it has been settled by the courts that the civil service commission has very broad discretion in determining that competition for any particular position is practicable, and that the courts will not interfere with the exercise of its discretion unless it is "palpably illegal."

2. An extension of the preference now conferred upon veterans of the Civil War to veterans of the Spanish War and other minor wars and military expeditions, such as those to China and Mexico, and possibly to the militia and to volunteer firemen. Civil service reformers are opposed to the creation of any privileged classes in the civil service, on the ground that it is unjustifiable and detrimental to good administration. The interests of the service itself should be para-

mount to the personal interests of any class, however deserving of public recognition, and the interests of the service require that persons classified alike under the civil service law should be treated alike. We would not deny any proper recognition to those who fought in the wars of the country, but this recognition should take some other form than preference in the civil service, which makes for a privileged class and discriminates against other classes of employes equally competent to serve the state. It is true that Civil War veterans now have a preference in appointment and promotion. The history of that preference is interesting. Undoubtedly, it is not in accordance with the true principles of civil service reform. But those who fought in the defense of our country over 50 years ago had extraordinary claims to the country's gratitude. They were favored for office before the institution of the merit system, and the laws establishing that system simply continued the then existing preference. The Civil War veterans are old men, and do not take examinations in such numbers as to interfere seriously with the competitive system. It would be ungracious and have little effect upon the service to take now from these old veterans the preference they have so long enjoyed. This is not true as regards veterans of the Spanish War and other minor wars, or the militia and the volunteer firemen.

In giving to those who have rendered military service a preference in appointment which virtually amounts to an opportunity to monopolize the great mass of public positions, the way is open for further class distinction. Legislation creating class distinctions and preferences, especially based upon military service, is not consonant with the ideals of this nation, whose founders declared against the military being superior to the civil power and for equality of opportunity for all men.

If this preference were granted, persons who were not preferred would scarcely find it worth while to compete in the examinations, and the civil service would lose its representative character and be confined to a military office-holding class. The proposal to give this preference to veterans is based upon a fundamentally unsound theory of public office. Public office

should not be regarded as a gratuity, but as an opportunity for service to the community by those most fitted to perform that service. To the extent that public office is an honor and means of livelihood all should enjoy equal opportunity to compete to gain such honor and livelihood.

Those who serve the nation in time of war deserve well of a grateful country. If this state wishes to reward in a fitting manner those citizens who have represented the state in time of national peril there can be no objection raised. It cannot be called, however, a fitting reward of patriotic service to grant to those who have rendered military service the privilege of impairing its civil service.

If preference were granted to these veterans it would serve as an entering wedge for still further extension of the preference plan. Members of the state militia, many of whom have served in riots and all of whom hold themselves ready for service in war, claim to be equally entitled to a preference with those whose brief war service was only in camps on home soil. There are also the volunteer firemen, who base a claim to preference on the services they have rendered to the public. Indeed, in previous legislatures resolutions amending the constitution have been introduced proposing a preference for these various classes. The extent to which these preferences might go, once a start was made, is shown by the bills introduced in previous legislatures proposing a preference in appointment to civil offices for ex-members of the legislature.

3. Some provision for the protection of officers and employees against removal. This is a problem for the legislature to solve, and has no place in the constitution. The organized advocates of civil service reform are absolutely opposed to any introduction of this principle into the constitution. It is not in the interests of the public service that obstacles should be put in the way of the removal of inefficient or undesirable public servants. The departments ought not to be clogged with persons whom it is exceedingly difficult to remove even if inefficient, and the heads of departments ought not to be unduly hampered in the administration of their offices.

The early supporters of the merit system started out with

the doctrine, so epigrammatically announced by Mr. Curtis, that if the front door was properly safeguarded the back door would take care of itself; in other words, where the merit system was in force and appointments had to be made from a competitive eligible list there would be no necessity of restricting the head of the department in the exercise of the power of removal. Experience has shown that this view is not entirely correct, and various efforts have been made to solve the problem.

The first civil service commission in this country recommended a procedure requiring reasons to be given and an opportunity to reply, and this recommendation was repeated frequently afterwards. In the federal service in 1897 a new rule was issued by President McKinley requiring a statement of reasons and an opportunity to reply in writing before dismissal. A similar procedure was provided for in the New York charter. Members of the classified service in the police and fire departments, however, acquired a right to trial, and this has been slowly extending to other departments, accompanied with a greater or less right to review of removals in the courts. Veterans of the Civil War as a preferred class acquired years ago a right to trial and review in the courts by *certiorari*, which has been extended to veterans of the Spanish War and veteran volunteer firemen. Civil service reformers in Chicago drafted, and have always defended, a provision of their law for a hearing before the civil service commission itself on removals, and some other western commissions have gone far in the same direction.

Every year in New York the legislature is the battle ground where advocates of court review for dismissed employes meet representatives of the Civil Service Reform Association, who oppose such legislation as fatal to efficiency and wholly wrong in principle. New York city civil service reformers believe that the passage of laws granting court review has come through the fact that administrative tribunals are not recognized in this country, and through failure to perceive that removal is as much an administrative function as appointment. The New York Civil Service Reform Association has approved

a bill placing removals in the hands of an administrative trial board under the jurisdiction of the civil service commission. On the other hand, the employes and heads of departments, regardless of party affiliation, have declined to approve this legislation.

All this goes to show that the best thought in the country is divided with reference to an effective and equitable solution of this important problem. In the presence of such a situation it would be unwise to attempt to solve the problem by some hard and fast provision embedded in the constitution. It must be largely a matter of careful experiment, and it would be much wiser to leave to the legislature its solution by trying the various plans, such as the administrative board under the jurisdiction of the civil service commission.

4. Provisions for civil pensions. This is a very broad and difficult subject, upon which there is as yet no general agreement. The friends of the merit system believe that it is not a matter for constitutional regulation, but should be left to the legislature and to the municipalities. Even before the legislature gives serious consideration to this problem a thorough investigation should be made to determine whether a retirement system can be devised which, without imposing an undue burden upon the taxpayers, will tend to increase the efficiency of the public service through caring for the old age of those who have served long and faithfully. A system of retiring annuities embodying correct principles can be made to rest upon a sound actuarial basis. At the present time, however, the data are almost wholly lacking for devising a sound plan for retiring at reasonable cost to the taxpayers the civil employes already in the service. Such investigations as have already been made into the conditions of employment in the federal service lead to the conclusion that a more thorough investigation is needed. This inquiry should ascertain and set forth accurately the facts essential to determining the cost to the taxpayers of establishing upon a sound actuarial basis a retirement system applicable to employes already in the public service. We need to know, for example, the length of service and the age of each employe, his salary at entrance, all

increases since, and his present salary. It is not necessary to emphasize the un wisdom of enacting any retirement system into law without the prior official collation and publication of such necessary statistical information. We have not this information at hand and, inasmuch as this matter is still controversial, it ought to be left to the legislature to provide for as the result of careful and intelligent inquiry and experience.

There is one other point which should be borne in mind in framing amendments to the present constitution; that is, the danger that the broad terms of some "home-rule" amendment may interfere with the present system of administering the civil service. Under the present system, which has obtained from the beginning in 1883, the state civil service commission has general supervision and some control over local municipal commissions, while the latter have the general right of initiative in local administration and entire control of details. This is as it should be, for the merit system is a state system founded on a general constitutional provision and a general state law. Enforcement of the constitutional provision and uniformity in administration are secured through the powers vested in the state commission. Supervision by the state commission is the only real safeguard provided in this state against the turning over of the control of the administration of the civil service law in cities to the exigencies of local politics. It provides an absolutely necessary check against non-enforcement of the law by local authorities and against falling below the standards established by the state commission. It acts not merely as a restraint, but also as a much needed support to the municipal commissions in times of stress when they are subjected to undue pressure by local authorities. In other states, such as Massachusetts and New Jersey, the law does not provide for local commissions, but places the control of the entire system in the hands of one general state commission. In New York the combined system of state and local commissions, with general supervision and control in the hands of the state commission, has worked well, and we believe it should not be changed. Not only should no change in this respect be made in the civil service clause of

the constitution, but care should be taken that no other clause of the constitution should indirectly take from the state civil service commission its present general powers over municipal commissions.

To sum up, generally, the present civil service provision of the constitution has worked satisfactorily and well; it is short and simple, and yet elastic; it embodies general principles and avoids details; it has been construed often by the courts, and its construction and meaning are definitely settled. It should be left as it is, and retained in the new constitution without amendment.